HER MAJESTY THE QUEEN .....APPELLANT;

AND

PETER KARPINSKI .....RESPONDENT.

1957

*Mar. 28
Apr. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Offence triable in two ways—Effect of withdrawal of information—Charge laid more than 6 months after commission of offence—Rights of Crown counsel and accused.

The accused was charged with failing to remain at the scene of an accident, which offence, under s. 221(2) of the *Criminal Code,* is triable either on indictment or on summary conviction. The offence was alleged to have been committed on March 16, 1955, and the information was laid on January 17, 1956.

When the accused was brought before a magistrate, Crown counsel, on being asked, stated that he wished to proceed summarily. The accused pleaded not guilty and his counsel immediately moved for dismissal of the charge on the ground that the prosecution was barred under s. 693(2), the information having been laid more than 6 months after the commission of the offence. The magistrate permitted counsel for the Crown to withdraw the information and to lay a new one on which a preliminary hearing was held, resulting ultimately in the conviction of the accused.

The Court of Appeal set aside the conviction on the ground that what had taken place before the magistrate amounted to an acquittal on the first information and that the accused was therefore entitled to succeed on a plea of *autrefois acquit.*

Held (Cartwright J. dissenting): The conviction should be restored.

Per Kerwin C.J.: The Crown had a right to withdraw the information and to change its election. There was no formal acquittal by the magistrate and what occurred at that time did not amount to an acquittal; to have this effect the first trial must have been concluded by an adjudication or its equivalent.

Per Taschereau J.: The withdrawal of the first information did not amount to an acquittal and the Crown could consequently proceed by indictment as it did. The accused was not placed in jeopardy on the first occasion.

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Per Fauteux and Abbott JJ.: The first information, considered as the institution of proceedings by summary conviction, was bad on its face, and the Crown therefore had no right to proceed by way of summary conviction, and the magistrate had no jurisdiction to accept the Crown's election and act upon it by receiving a plea. The election and plea were therefore void and did not constitute a bar to the subsequent proceedings by indictment.

Per Cartwright J., *dissenting*: In the circumstances of the case, the withdrawal of the first information was tantamount to an acquittal, since counsel for the defence was not raising a technical objection which would be a bar to the magistrate adjudicating upon the charge but was bringing forward a defence in law to which there was no answer. The magistrate should have dismissed the charge and his action in permitting it to be withdrawn was, in the circumstances, the equivalent of a dismissal.

APPEAL from a judgment of the Court of Appeal for Ontario (1) setting aside a conviction. Appeal allowed.

W. B. Common, Q.C., and *E. R. Pepper*, for the appellant.

Stanley Smither, for the respondent.

THE CHIEF JUSTICE:—The Crown had the right to change its election before the magistrate and also the right to withdraw the information. Assuming that the respondent raised the plea of *autrefois acquit* before His Honour Judge Forsyth, there had certainly not been a formal acquittal by the magistrate on January 24, 1956, and in my opinion what occurred at that time did not amount to an acquittal. The first trial must have been concluded by an adjudication, or what amounts thereto: *Regina v. Charlesworth* (2); *Re Rex v. Ecker; Re Rex v. Fry* (3). It has been held that where a trial had commenced and the jury had been discharged and a new one empanelled, the plea could not avail even if the discharge of the first jury had been improper or if a Court of Error or Appeal considered that under the circumstances the first jury should not have been discharged: *Regina v. Charlesworth, supra; Winsor v. The Queen* (4); *Rex v. Lewis* (5).

The appeal should be allowed, the conviction restored and the case remitted to the Court of Appeal so that the respondent's application for leave to appeal from the sentence may be dealt with.

(1) [1957] O.W.N. 21.
(2) (1861), 1 B. & S. 460, 121 E.R. 786.
(3) 64 O.L.R. 1, 51 C.C.C. 409, [1929] 3 D.L.R. 760.
(4) (1866), L.R. 1 Q.B. 289, 390.
(5) (1909), 2 Cr. App. R. 180.

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TASCHEREAU J.:—I am of the opinion that the withdrawal by the Crown of the first information did not amount to an acquittal, giving rise to the plea of *autrefois acquit,* and that the Crown could consequently proceed by indictment as it did. The respondent was not in jeopardy.

I would allow the appeal and restore the conviction, and remit the case to the Court of Appeal so that the respondent's application for leave to appeal from the sentence may be dealt with.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario pronounced on November 29, 1956, quashing the conviction of the respondent on September 21, 1956, at the General Sessions of the Peace for the County of York and directing a verdict of acquittal to be entered.

The proceedings against the respondent were commenced by the swearing of an information on January 17, 1956, charging:

> that on the 16th day of March in the year 1955, at the City of Toronto, in the County of York, owing to the presence of a vehicle bearing license number 139675 (Saskatchewan) for the year 1954 on the highway, to wit, on Dundas St. W. an accident had occurred to SAM PECALIS and that PETER KARPINSKI the person having the care, charge or control of the vehicle with intent to escape liability, either civil or criminal, failed to stop his vehicle, offer assistance and give his name and address, contrary to the *Criminal Code,* section 221, sub-section 2.

On January 24, 1956, the respondent appeared before His Worship Magistrate Bigelow to answer the charge. As the offence created by s. 221(2) may be dealt with either as an indictable offence or as an offence punishable on summary conviction, the clerk of the Court after reading the charge to the respondent asked Crown counsel how he wished to proceed and he elected to proceed summarily. The clerk then called upon the respondent to plead and he pleaded "not guilty". After this plea and before any evidence had been given counsel for the respondent moved to dismiss the charge on the ground that the proceeding had been instituted more than six months after the time when the alleged offence was committed and was consequently barred by the provisions of s. 693(2) of the *Criminal Code.* The learned magistrate then permitted counsel for the Crown to

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withdraw the information against the protest of counsel for the respondent who submitted that he was entitled to have the charge dismissed.

A new information was then laid and read to the respondent and Crown counsel elected to proceed by way of indictment. The respondent, having refused to elect as to his method of trial on the ground that the proceedings were improper, was committed for trial after a preliminary inquiry had been held by the learned magistrate. In due course Crown counsel preferred a bill of indictment. The grand jury returned a true bill. The trial was held on September 20 and 21, 1956, before His Honour Judge Forsyth and a jury.

At the opening of the trial and before pleading counsel for the respondent moved to quash the indictment on grounds which are summarized as follows in the factum of counsel for the appellant:

(a) The Crown had no right to change their election before the magistrate.

(b) The Crown had no right to withdraw the information.

(c) If the Crown withdrew the information without the consent of the accused, that withdrawal was tantamount to a dismissal and the accused can successfully plead *autrefois acquit*.

The learned trial judge declined to give effect to the motion and proceeded with the trial which resulted in the conviction which was quashed by the Court of Appeal.

While the point was not pressed, it was suggested that the respondent had failed to raise the plea of *autrefois acquit* before His Honour Judge Forsyth. There appears to have been some lack of formality in the proceedings, but the record shows that before entering a plea of not guilty, counsel for the respondent made it clear that he relied on the submission that his client was entitled to be discharged on the plea of *autrefois acquit* and the matter was argued at length before the learned trial judge. In my view the plea was sufficiently raised.

It is argued for the appellant that the respondent was not in jeopardy in the summary proceedings before the magistrate, "that there was no adjudication on the merits or otherwise, nor could there have been, since the learned Magistrate was without jurisdiction". I am unable to give effect to this argument.

Section 693(2) which limits the time within which proceedings in respect of offences punishable on summary conviction may be instituted is as follows:

(2) No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

The effect of this subsection is not, in my opinion, to deprive the magistrate of jurisdiction in a case in which the subject matter of the proceedings in fact arose more than six months before their institution but rather to afford a defence to the charge. While no such difficulty arises in the case at bar, the decisions collected in 21 Halsbury, 2nd ed. 1936, at p. 598 show that questions of fact and law may well arise as to when the six months' period commences to run in a particular case.

In the case at bar, after the information had been read, the Crown had elected to proceed summarily, the respondent had been called upon to plead and had pleaded "not guilty", the learned magistrate had jurisdiction over the accused and over the offence with which he was charged and, as is pointed out by Laidlaw J.A., the trial had commenced. *Prima facie,* it was the duty of the learned magistrate to proceed with the trial as provided by s. 708(3) and s. 711 of the *Criminal Code,* reading as follows:

708(3) Where the defendant pleads not guilty or states that he has cause to show why an order should not be made against him, as the case may be, the summary conviction court shall proceed with the trial, and shall take the evidence of witnesses for the prosecutor and the defendant in accordance with the provisions of Part XV relating to preliminary inquiries.

711. When the summary conviction court has heard the prosecutor, defendant and witnesses it shall, after considering the matter, convict the defendant or make an order against him or dismiss the information, as the case may be.

The provisions of s. 697(3) emphasize the importance of the respondent having pleaded. That subsection reads as follows:

(3) Subject to section 698, in proceedings under this Part no summary conviction court other than the summary conviction court by which the plea of an accused is taken has jurisdiction for the purposes of the hearing and adjudication, but any justice may

(*a*) adjourn the proceedings at any time before the plea of the accused is taken, or

(*b*) adjourn the proceedings at any time after the plea of the accused is taken for the purpose of enabling the proceedings to be continued before the summary conviction court by which the plea was taken.

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I do not find it necessary to determine in what circumstances, if any, a charge may properly be withdrawn against the objection of the accused after the commencement of a trial before a summary conviction court, as I have concluded that Mr. Smither is right in his submission that in the case at bar the withdrawal was tantamount to an acquittal.

On the argument before us both counsel referred to the judgment of the Nova Scotia Supreme Court in *Re Bond* (1), and relied upon the following passage from the judgment of Graham J. at p. 515:

> It remains to consider whether the withdrawal should be construed under any other rule of law to be an acquittal. The cases in other jurisdictions are not easy to reconcile, and we are, therefore, thrown back on reason and the application of principles.
>
> The withdrawal of a charge before any evidence is given may be tantamount to a trial, and so may put an end to the complaint; but that can only be so when the true inference from the circumstances is, that the magistrate permitted the withdrawal, because he decided that there was not a proper case for trial or that trial was unnecessary, and so passed upon the merits. The general law is that to support the plea of *autrefois acquit* there must have been a trial and an acquittal on the merits.

In *Haynes v. Davis* (2), Lush J. said:

> I quite agree that "acquittal on the merits" does not necessarily mean that the jury or the magistrate must find as a matter of fact that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be acquitted as in law he was not guilty, and to that extent the expression "acquittal on the merits" must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudicating upon it. That is why this expression is important, however one may qualify it, and I think the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the Court cannot proceed to find if he is guilty.

Applying the reasoning of the above passages to the facts of the case at bar, it appears that in the course of the trial Mr. Smither brought to the attention of the learned magistrate the undisputed fact that the alleged offence was committed more than six months before the commencement of the proceedings. In so doing he was not raising a technical ground which would be a bar to the magistrate adjudicating upon the charge; he was bringing forward a

(1) 10 M.P.R. 506, 66 C.C.C. 271, [1936] 3 D.L.R. 769.
(2) [1915] 1 K.B. 332 at 338-9.

defence in law to which there was no answer. To use the words of Graham J., quoted above, any further trial "was unnecessary"; the learned magistrate was in a position to pass upon the merits as no evidence could have been given that would have altered the result. In my respectful view, the learned magistrate ought to have dismissed the charge, and his action in permitting it to be withdrawn was, in the circumstances, the equivalent of a dismissal.

It may be mentioned in passing that in actions for malicious prosecution the withdrawal of a charge in open Court by the Crown Attorney, otherwise than in pursuance of a compromise or agreement between the parties, has consistently been held to constitute a termination of the criminal proceedings in favour of the accused; see for example *Fancourt v. Heaven* (1), and the cases there cited.

If it should be suggested that, in the result, a man who was convicted on sufficient evidence before a properly instructed jury goes free because of the decision, perhaps made inadvertently, to proceed summarily before the magistrate, I would recall the words of Viscount Sankey L.C. in *Maxwell v. The Director of Public Prosecutions* (2), which although used in different circumstances are of general application:

> But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed. . . . It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

The general rule on which the respondent relies was not questioned. It is stated in the following terms in Broom's Legal Maxims, 10th ed. 1939, p. 223:

> The maxim *nemo debet bis vexari pro una et eadem causa* expresses a great fundamental rule of our criminal law, which forbids that a man should be put in jeopardy twice for one and the same offence. It is the foundation of the special pleas of *autrefois acquit* and *autrefois convict*. When a criminal charge has been once adjudicated upon by a Court of competent jurisdiction, that adjudication is final, whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a subsequent prosecution for the same offence . . . Provided that the adjudication be by a Court of competent jurisdiction, it is immaterial whether it be upon a summary proceeding before justices or upon a trial before a jury.

(1) (1909), 18 O.L.R. 492.

(2) [1935] A.C. 309 at 323-4.

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I have already indicated my view that, in the circumstances of the case at bar, the withdrawal of the charge before the learned magistrate was tantamount to an acquittal.

I would dismiss the appeal.

The judgment of Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—The circumstances giving rise to this appeal are fully stated in the reasons for judgment of my brother Cartwright and need not be related here to a similar extent.

A first information, laid and sworn to on January 17, 1956, charged respondent with having, on March 16, 1955, failed to stop at the scene of an accident, contrary to s. 221(2) of the *Criminal Code*. Such an offence may be prosecuted by way of indictment or of summary conviction at the option of the complainant. The information here having been laid and sworn to more than six months after the date of the alleged violation, proceedings in the latter form were then barred by the provisions of s. 693(2) reading:

> 693(2). No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

Notwithstanding the clear terms of this statutory prohibition, counsel for the Crown was requested, upon arraignment of respondent, to elect and elected to proceed by way of summary conviction. Whereupon respondent pleaded not guilty, and, promptly invoking the statutory prohibition, moved for the dismissal of the charge. The magistrate refused to grant this motion, permitting instead the withdrawal of the information. Respondent was immediately arraigned upon a fresh information, couched in terms similar to those of the first, and was ultimately indicted and convicted.

The submission of respondent, rejected by the trial judge but accepted in the Court of Appeal, is that, the Crown having no right to change its election and withdraw the information after the plea of not guilty, such withdrawal was therefore tantamount to a dismissal giving rise to a plea of *autrefois acquit*.

In my respectful view, it is unnecessary to deal with the merits of the conclusion of this proposition, for the premises upon which it rests are not established. In the circumstances of this case, there were no right for the Crown to elect to proceed by way of summary conviction and no jurisdiction for the magistrate to accept and act upon the election by receiving a plea. On the face of the information itself, it was manifest that more than six months had elapsed from the date when the subject matter of the proceedings had arisen; and of its nature the offence charged was not capable of being one having a continuing character. Non-compliance with the statutory requirement of s. 693(2) was fatal to the validity of the election and plea, both of which were void.

Other grounds of appeal were raised by the accused in the Court of Appeal but were abandoned at the hearing before us.

I would dispose of the appeal as proposed by my Lord the Chief Justice.

Appeal allowed, CARTWRIGHT J. *dissenting.*

Solicitor for the appellant: C. P. Hope, Toronto.

Solicitors for the respondent: Smither & Rose, Toronto.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Abbott JJ.